ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION I

CA06-497

April 4, 2007

BRENT W. BEAHM, M.D., and PAMELLA BEAHM WOODWORTH
APPELLANTS

v.

FIRST WESTERN BANK
APPELLEE

AN APPEAL FROM LOGAN COUNTY CIRCUIT COURT
[No. CV-04-33]

HONORABLE TERRY M. SULLIVAN, CIRCUIT JUDGE

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

SARAH J. HEFFLEY, Judge

This is an appeal from a decree foreclosing a mortgage and granting judgment to a bank against a debtor and a guarantor. We reverse the trial court's decision as to the guarantor; we affirm in part and reverse and remand in part as to the debtor.

Appellant Pamella Beahm Woodworth and her erstwhile husband, John Smith, entered into a construction-loan agreement with appellee First Western Bank's predecessor in February 1990. On March 14, 1991, Pamella (only), d/b/a Beahm Farms, signed a note, a Small Business Administration Guaranty, and a mortgage on real property in Logan County in exchange for a loan of $449,500 from the bank. The note, which contained an

interest rate of eleven percent and provided that quarterly payments of $18,668.41 would be made for ten years, provided:

> The undersigned shall pay all expenses of any nature, whether incurred in or out of court, and whether incurred before or after this Note shall become due at its maturity date or otherwise, including but not limited to reasonable attorney's fees and costs, which Holder may deem necessary or proper in connection with the satisfaction of the indebtedness or the administration, supervision, preservation, protection of (including, but not limited to the maintenance of adequate insurance) or the realization upon the Collateral. Holder is authorized to pay at any time and from time to time any or all such expenses, add the amount of such payment to the amount of the indebtedness, and charge interest thereon at the rate specified herein with respect to the principal amount of this Note.

The guaranty, which was also signed by Pamella's brother, appellant Brent Beahm, stated:

> [T]he undersigned unconditionally guarantees to Lender, its successors and assigns, the due and punctual payment when due, whether by acceleration or otherwise, in accordance with the terms thereof, of the principal of and interest on and any other sums payable, or stated to be payable with respect to the note of the Debtor, made by the Debtor to Lender dated 3/14/91 in the principal amount of $449,500, with interest at the rate of 11% per cent per annum. Such note, and the interest thereon and all other sums payable with respect thereto are herein after collectively called "Liabilities." . . .
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> . . . .
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> The Undersigned waives any notice of the incurring by the Debtor at any time of any of the Liabilities, and waives any and all presentment, demand, protest or notice of dishonor, nonpayment, or other default with respect to any of the Liabilities and any obligation of any party at any time compromised in the collateral. The Undersigned hereby grants to Lender full power, in its uncontrolled discretion and without notice to the undersigned, but subject to the provisions of any agreement between the Debtor or any other party and Lender at the time in force, to deal in any manner with the Liabilities and collateral, including, but without limiting, the generality of the foregoing, the following powers:
>
> > (a) to modify or otherwise change any terms of all or any part of the Liabilities or the rate of interest thereon (but not to increase the principal amount of the

> note of the Debtor to the Lender), to grant any extension or renewal thereof and any other indulgence with respect thereto, and to effect any release, compromise or settlement with respect thereto . . . .

In 1992, Larry and Tammye Ashley entered into an agreement with Pamella to buy the property and agreed to assume Pamella's debt to the bank. Pamella and the Ashleys entered into a note modification agreement with the bank in 1994. This agreement referenced the 1991 note, No. 99019043, and stated that, at Pamella's and the Ashleys' request, the 1991 note was modified to the terms stated therein and that the agreement "[did] not in any way, satisfy or cancel the original obligation. Except as specifically amended by this agreement, all other terms of the original obligation remain in effect." This agreement modified the interest rate to two and three-quarters percent above New York Prime, with annual adjustments, not to exceed a maximum rate of eleven percent; it also modified the payment amount and the term; thereafter, the borrowers would pay $12,508.11 quarterly for a term of fifteen years (until 2009). It also said: "All parties obligated in any way to pay the original obligation (including any co-makers, endorsers and guarantors) remain liable for the total obligation as amended by this agreement." Brent did not sign this document. It was the last document signed by Pam.

On December 20, 1999, the Ashleys signed an extension to note No. 99019043. Pamella was not a party to this instrument, which referred to a funding date of March 14, 1991. It modified the interest rate to nine percent, with fourteen annual principal payments of $27,116.78, and fifty-six quarterly payments of accrued interest; the note was due on December 20, 2014. This extension listed the Ashleys as the sole borrowers on the note.

On September 20, 2000, the Ashleys signed a modification and extension of the mortgage. This document referenced the original loan date of March 14, 1991, as well as the December 20, 1999 extension and modification, and stated that the parties had agreed to extend the note until September 20, 2015. Pamella, who still owned record title to the property, did not sign this document, which names the Ashleys as the sole borrowers and mortgagors. The Ashleys also signed an agricultural security agreement on September 20, 2000, stating a funding date of September 20, 2000, for loan No. 99019043 and giving a security interest in all equipment, accounts receivable, and a mobile home. The Ashleys were named as the borrowers on this document and were listed as owners of the collateral. Pamella, who was the record titleholder of the mobile home, did not sign this document.

On September 20, 2002, the Ashleys signed another extension and amendment to the note, referencing loan No. 99019043, giving a funding date of December 20, 1999, and modifying the interest rate to eight and one-half percent. It also provided for twelve annual principal payments of $28,400.88 and twelve annual payments of accrued interest; this amended note was due and payable on September 20, 2015. The Ashleys were named as the borrowers on this note. Pamella did not sign this extension; the 1994 modification agreement was the only one she signed. Brent signed no extensions.

The Ashleys defaulted on the loan and filed for bankruptcy. The bank sued the Beahms on May 3, 2004, for the entire debt; it also sought foreclosure on the mortgage.[1] On

[1]The bank also sued the Ashleys, Frances Ashley a/k/a Johnson, the Internal Revenue Service, Fairfax Elevator Company, Inc., the United States Department of Agriculture, Farmers Home Administration a/k/a Farm Service Agency, and Roger Buffington. The

September 2, 2004, the bank filed an amended complaint, referencing the note signed by Pamella on "March 14, 1992," and the 1994 modification agreement. Pamella and Brent raised the defenses of novation, discharge, and statute of limitations.

The only witness at trial was Glenda McConnell, a loan officer with the bank. She testified that the current payoff was $476,762.19 and that, until 2002 or 2003, regular payments were received. The Lender's Transcript of Account was admitted into evidence through her testimony. She explained that, although the bank's computer records "zeroed out" the balance due at the time of the December 1999 extension, it did not mean that the loan had been paid; that action, she said, was simply a feature of the bank's computer software program. She also stated that $39,033.51 was added to the principal balance for "forced-placed" insurance in December 1999. Ms. McConnell admitted that the modification agreement in 1994, which changed the due date from 2001 to 2009, was a material change. She also described the extension of the payout date in December 1999 from 2009 to 2014 and the reduction in annual payments as being material changes. Additionally, she admitted that the extension dated December 20, 2000, which extended the payout date until September 2015, was a material change. Ms. McConnell further admitted that Brent's guaranty did not give the bank the right to increase the principal amount of the debt; that the principal had been increased by the addition of insurance payments and unpaid interest; and

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bank's claims against all of the defendants were disposed of in three decrees: an in rem foreclosure decree filed on December 9, 2005; an in rem foreclosure decree filed on December 21, 2005; and the foreclosure decree filed on January 19, 2006, from which this appeal is brought.

that the bank had violated the guaranty by doing so. She also stated that, although the guaranty gave the bank the right to grant an extension, it did not give the bank the right to more than double the term of years on the note.

The circuit court entered judgment for the bank in the amount of $476,762.19 against Pamella and Brent and ordered that the property be foreclosed upon if the judgment were not paid within ten days. The court also granted the bank immediate possession of the personal property, including the mobile home. Brent and Pamella filed timely notices of appeal.

Brent and Pamella moved for directed verdict at the conclusion of the bank's case, and the trial court denied their motions. A trial court's duty is to review a motion for directed verdict at the conclusion of a plaintiff's case by deciding whether, if it were a jury trial, the evidence would be sufficient to present to the jury. *Woodall v. Chuck Dory Auto Sales, Inc*., 347 Ark. 260, 61 S.W.3d 835 (2001). A motion for directed verdict should be granted only if there is no substantial evidence to support a jury verdict. *Id*. When asked to review the denial of a motion for directed verdict, we examine the evidence, along with all reasonable inferences deducible from it, in the light most favorable to the party against whom the motion is sought. *ERC Mortgage Group, Inc. v. Luper*, 32 Ark. App. 19, 795 S.W.2d 362 (1990).

We first address Brent's arguments. It is his primary contention that the circuit court erred in denying his motion for directed verdict on the ground that he was discharged from his guaranty because the guaranteed note was materially modified without his consent in the

following ways: (1) the April 1994 modification agreement reduced the yearly payments by approximately $24,000 and extended the payoff date from 2001 to 2009; (2) in December 1999, the Ashleys reduced the payments and extended the payoff date to December 20, 2014, and changed the terms of the payments from quarterly to annual payments, without the consent of Pamella or Brent; (3) in September 2000, the payoff date was extended to September 2015, fifteen and one-half years beyond the original payoff date; (4) Pamella was not listed as a debtor on any of the agreements between the bank and the Ashleys between 1999 and 2002; and (5) additions were made to the principal amount of the note for forced-placed insurance and accrued interest, including an addition of $39,033.51 in December 1999.

Brent further contends that the increase in the amount of the principal owed on the debt also released his obligation as a guarantor. He notes that the guaranty stated that the lender could not increase the principal amount of the note and that Ms. McConnell acknowledged that an increase in principal was not allowed under the guaranty and conceded that he was not responsible for the amounts that had been added to the principal. He asserts that the total effect of these modifications was to change his original guaranty of a $449,500 loan to Pamella, which was to have been paid off by 2001, into a $476,762.19 loan to strangers, with substantially-reduced payments and a maturity date of 2015.

A guarantor, like a surety, is a favorite of the law, and his liability is not to be extended by implication beyond the expressed terms of the agreement or its plain intent. *B.S.G. Foods, Inc. v. Multifoods Distribution Group*, 75 Ark. App. 30, 54 S.W.3d 553

(2001). A guarantor is entitled to have his undertaking strictly construed, and he cannot be held liable beyond the strict terms of his contract. *Id*. Any material alteration of the obligation assumed, made without the consent of the guarantor, discharges him. *Id*. An alteration is not material unless the guarantor is placed in the position of being required to do more than his original undertaking. *Continental Ozark, Inc. v. Lair*, 29 Ark. App. 25, 779 S.W.2d 187 (1989). A guarantor who pleads release has the burden of proving that release. *Id*. In determining whether an alteration is material, the courts look to see whether the guarantor has been placed in a position different from that which he promised to guarantee. *Finagin v. Ark. Dev. Fin. Auth*., 355 Ark. 440, 139 S.W.3d 797 (2003).

If, however, the guaranty agreement specifically provides that it will not be affected by renewals or extensions of the obligation guaranteed, that provision will be honored. *Morrilton Sec. Bank v. Kelemen*, 70 Ark. App. 246, 16 S.W.3d 567 (2000). Where the guaranty contract contains a provision that authorizes a change in the terms of the principal contract, a change within the scope of that authorization does not discharge the guarantor. *Id*.

Because there were material changes that increased the amount of principal, and completely changed the identity of the party whose loan Brent intended to guarantee, we hold that he is released from his guaranty and that the trial court erred in denying his motion for directed verdict. We need not, therefore, address Brent's statute-of-limitations argument.

We now turn to Pamella's issues. She argues that the circuit court erred by failing to find that a novation had occurred so as to absolve her liability as a primary obligor on the

note. She argues that there was a novation, beginning with the first modification after the 1994 extension, which was the 1999 extension. The Ashleys were shown as the borrowers on that and all subsequent loan documents. Pamella points out that, after 1994, she was not listed as a borrower or asked to sign any document, to give her consent to any modification, or requested to make any payment; that the principal was increased by $39,033.51 on December 20, 1999; that the bank used the social security number of one of the Ashleys, not Pamella's, as an identification number for the loan; and that the bank reduced the balance of the original loan to $0 as of December 20, 1999, before restating the loan balance, as of that date, for the full amount owed.

A novation is a substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty. RESTATEMENT (SECOND) OF CONTRACTS § 280 (1981). A novation discharges the original duty, as does any other substituted contract, so that breach of the new duty gives no right of action on the old duty. *Id*. § 280 cmt. b. Novation is the substitution, by mutual agreement, of a new debt or obligation for an existing one, and, like any other contract, a novation must be supported by mutual obligation. *McIllwain v. Bank of Harrisburg*, 18 Ark. App. 213, 713 S.W.2d 469 (1986). The burden of establishing a novation is upon the party claiming it. *Id*. In order for there to be a novation, it is necessary to show an intent on the part of the creditor to release an old debtor and substitute a new debtor. *Id*. There must be a clear and definite intention on the part of all concerned that such is the purpose of the agreement. *Id*. It is not essential that the assent to and acceptance of the terms of the novation be shown by express words to that

effect; rather, it may be implied from the facts and circumstances attending the transaction and in the conduct of the parties thereafter. *Id*. Whether a novation occurred is a question of fact if there is any conflicting evidence, or if the terms of the agreement are capable of more than one construction. *Alston v. Bitely*, 252 Ark. 79, 477 S.W.2d 446 (1972).

When the evidence is viewed in the light most favorable to the bank, as is required, we discern no clear and definite intention on the part of all concerned for the bank to release Pamella and substitute the Ashleys in her stead. Throughout the life of the loan, the loan number has consistently remained the same. The parties never signed a new note. *Cf. Brandon v. Worthern Bank & Trust Co.*, 6 Ark. App. 111, 639 S.W.2d 66 (1982), (where a second note was executed and a novation found). In two of the four modifications, the documents referred to March 14, 1991, as the funding date of the loan. Each of the modifications referenced the original note, stating "The terms, definitions, and conditions of the existing Note are incorporated by this reference, and shall remain in full force and effect except as specifically extended/amended by this Agreement." We attach no significance to the fact that the loan showed a zero balance at the time of the December 1999 extension because the sole witness who testified about this issue explained that this was a feature of the bank's computer software program and did not represent satisfaction of the loan. We believe the evidence falls short of creating an inference that a novation occurred. Therefore, we affirm on this point. In a related argument, Pamella contends that material alterations in the debt were sufficient to discharge her obligations under both the note and the guaranty agreement. She cites *Germer v. Missouri Portland Cement Co.*, 301 Ark. 277, 783 S.W.2d

359 (1990), and *INTER-SPORT, INC. v. Wilson*, 281 Ark. 56, 661 S.W.2d 367 (1983), as authority for the proposition that such material alterations discharge a guarantor. We find this argument to be inapposite because Pamella remained a primary obligor on the note, and not merely a guarantor. While Pamella cites authority to the effect that material alterations discharge a guarantor on a debt, she cites no authority whatsoever that discharge of a guaranty also works to extinguish her primary liability on the note. It is axiomatic that this court will not consider issues that are unsupported by convincing argument or sufficient citation to legal authority. *Ganey v. Kawasaki Motors Corp., U.S.A.*, ___ Ark. ___, ___ S.W.3d ___ (May 4, 2006). Otherwise, we need not discuss whether she has been released under the guaranty because of our holding that she remains primarily liable on the debt.

Pamella in her third point asserts that the negligence of the bank extinguished the mortgage and rendered the note unenforceable against her, citing *Peoples Bank of Imboden v. Burgess,* 57 Ark. App. 68, 942 S.W.2d 264 (1997). In that case, the debtors gave the bank a note and mortgage; the note was guaranteed by two individual guarantors. Later, the original debtors gave the guarantors a note, secured by the same property. The bank subsequently loaned one of the original debtors additional money to cover prior loans via a new note and mortgage on the same property, giving the debtor receipts reflecting payment of the original debt and the other loans. The court found that, although the bank had not intended to release its priority status when executing the final loan, it had negligently done so by discharging the original debt and extinguishing the original mortgage lien. In the case at bar, the bank argues that *Peoples Bank* is distinguishable because it did not give Pamella

any receipt reflecting payment in full of the original indebtedness. We agree. The bank's negligence in *Peoples Bank* rested on the unintentional release of the original debt and security. There has been no release here; consequently, that decision affords Pamella no comfort.

Last, Pamella raises two issues contesting the amount of the judgment. She contends that the judgment did not have a reduction for unauthorized principal and the accumulated interest on the additional principal. She also argues that the bank failed to prove the amount of principal and interest to which is was entitled. We find merit in this argument.

The circuit court granted judgment in the amount of $476,762.19, which represented the balance of the loan up to and including the final extension in 2002. The bank, however, concedes that it does not seek to hold Pamella liable on the post-1994 loan documents to which she was not a party. At the time of trial, the bank did not know the current balance under the 1994 extension. Therefore, we remand for the court to determine based on the record the balance owed on Pamella's original note as extended by the 1994 extensions.

Affirmed in part; reversed and remanded in part.

HART and MARSHALL, JJ., agree.